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No. 92-457

In the Supreme Court of the United States

OCTOBER TERM, 1992

SEA AIRMOTIVE, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States, when it has paid benefits to an injured federal employee under the Federal Employees' Compensation Act, is entitled to the same immunity from suit by a third party for indemnity or contribution as would inure to a private employer who had paid compensation to an injured employee pursuant to the applicable state workers' compensation law.

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OPINIONS BELOW

The second opinion of the court of appeals (Pet. App. A1-A7) is reported at 967 F.2d 307. That court's first opinion (Pet. App. A33-A50) is reported at 833 F.2d 1375. The second opinion of the district court (Pet. App. A8-A32) is reported at 755 F. Supp. 269. That court's first opinion (Pet. App. A51-A60) is unreported.

JURISDICTION

The opinion of the court of appeals was rendered on June 15, 1992. A petition for a writ of certiorari was filed

on September 14, 1992.[1] This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 13, 1979, a helicopter leased by the National Oceanographic and Atmospheric Administration (NOAA) and piloted by one of its employees ran out of fuel and crashed while en route from Anchorage, Alaska, to Seattle, Washington. Passenger Gary Mitchell, a civilian employee of NOAA, was injured. Pet. App. A34-A35.

Mitchell received compensation pursuant to the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* He also brought a tort action in the Alaska Superior Court against Bell Helicopter Textron, Inc. (manufacturer of the helicopter) and petitioners Sea Airmotive, Inc. (seller of the helicopter) and Gay Airways, Inc. (lessor of the helicopter). Mitchell claimed that these parties were liable to him for manufacturing and furnishing the helicopter to the government in an uncrashworthy condition. On February 20, 1985, the parties settled the case for approximately $2.4 million. Pet. App. A35.

2. Petitioners subsequently sued the United States for indemnity or contribution under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, which under certain circumstances waives sovereign immunity and renders the United States liable "to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. They alleged that the crash occurred because the pilot of the helicopter was negligent in his preflight planning. Pet. App. A36.

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[1] Bell Helicopter Textron, Inc., also a plaintiff and appellant below, has filed a separate petition for certiorari, No. 92-456.

The district court granted the government's motion to dismiss. Pet. App. A51-A60. Under Alaska's workers' compensation law,[2] once an employer pays compensation to an employee for a work-related accident, the employer is not subject to suit for indemnity or contribution by a third party against whom the employee has recovered in a suit concerning the same accident. *Id.* at A53. The district court agreed that because the FTCA renders the United States liable only to the same extent as a private party under like circumstances, the government was entitled by analogy to the immunity from indemnity or contribution that state law would have granted a similarly situated private employer. *Id.* at A36.

3. The court of appeals affirmed the district court's ruling on the contribution issue. Pet. App. A36-A46. Relying on its prior decision in *LaBarge* v. *Mariposa County*, 798 F.2d 364 (9th Cir. 1986), cert. denied, 481 U.S. 1014 (1987), the court framed the issue as "how Alaska law would be applied to an Alaska employer in similar circumstances." Pet. App. A40. Recognizing that "the federal government could never be exactly like a private actor," however, the court sought "the most reasonable analogy." *Id.* at A44-A45. Because the court found FECA "comparable to a state workers' compensation law," it concluded that the United States was entitled to "the same immunity from suit enjoyed by a private employer covered by" the Alaska law. *Id.* at A45.

Although the court of appeals affirmed the dismissal of petitioners' claim for contribution, it found that the district court had not adequately addressed their claim of

[2] Although the accident occurred in Canada, the allegedly negligent planning occurred in Alaska, and the parties agreed below that Alaska law applied. Pet. App. A38, A40.

implied indemnity. It therefore remanded for further consideration of that issue under Alaska law. Pet. App. A46-A50. On remand the district court ruled, based in part on an intervening decision of the Alaska Supreme Court, that petitioners could not recover on any theory of indemnity. *Id.* at A20-A32. The court of appeals affirmed. *Id.* at A1-A7.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. The courts of appeals that have addressed analogous issues in recent years have adopted similar interpretations of the FTCA. Accordingly, the petition does not present any issue that warrants review by this Court.

1. Petitioners argue (Pet. 10-13) that the decision below conflicts with *Richards* v. *United States*, 369 U.S. 1 (1962). In *Richards*, this Court interpreted 28 U.S.C. 1346(b), which confers jurisdiction over FTCA suits "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The Court held that Section 1346(b) required application of the "whole law" of the relevant state, including its rules on choice of law. 369 U.S. at 3, 11.

Petitioners appear to contend (Pet. 16-17, 24 n.2) that an Alaska court faced with the present case would have determined the United States' substantive liability under FECA. As the Second Circuit held in *Caban* v. *United States*, 728 F.2d 68 (1984), however, "[a]pplying the state's 'whole law' requires that [a federal court] look to whatever law, including federal law, the state courts would apply in like circumstances *involving a private defendant*." *Id.* at 72 (emphasis added). FECA

does not apply to any employer other than the federal government. Thus, Alaska's choice of law rules could not possibly lead to the choice of FECA as the law applicable to the hypothetical suit between private parties envisioned by the FTCA.

Petitioners cite (Pet. 17-19) two cases in which courts of appeals have found that federal law supplied the rule of decision.[3] In each case, however, the federal law in question was relevant to the issue of what a state court would have found to be the duties and liabilities of a private party in like circumstances. In *Caban* v. *United States*, *supra*, the question was whether officials of the Immigration and Naturalization Service had wrongfully detained the plaintiff at a border stop in New York. 728 F.2d at 70. The New York law of false imprisonment imposed no liability if the defendant could show that his actions were justified by the law of New York or of some other jurisdiction. *Id.* at 72. Thus, the federal law that justified the plaintiff's detention was relevant to the question of whether the INS officials, if private parties, would have been liable to the plaintiff under state law.

Similarly, the court in *Gowdy* v. *United States*, 412 F.2d 525 (6th Cir.), cert. denied, 396 U.S. 960 (1969), determined whether the case should be governed by federal maritime law by considering whether maritime law

[3] Petitioners also cite (Pet. 20-21) *Johnson* v. *United States*, 576 F.2d 606 (5th Cir. 1978). *Johnson* involved the distinct question of whether *Richards*' "whole law" analysis required the application of state principles of res judicata or collateral estoppel to determine the preclusive effect, in FTCA litigation, of a prior federal judgment. The decision thus concerned a particular "issu[e] of internal court procedure or the relationships between courts," *id.* at 611, and is not relevant to the question of substantive liability presented here.

would have applied had the case been one between private parties. The court relied on *Hess* v. *United States*, 361 U.S. 314, 318 n.7 (1960), in which this Court applied maritime law to an FTCA case on the ground that "[t]here can be no question but that Oregon would be required to apply maritime law if this were an action between private parties, since a tort action for injury or death occurring upon navigable waters is within the exclusive reach of maritime law."[4]

FECA, by contrast, is not applicable to cases against a private defendant. Neither *Caban* nor *Gowdy* gives any indication that the Second or Sixth Circuit would have differed from the Ninth Circuit on the proper resolution of the present case. Indeed, other courts of appeals that have addressed the issue of indemnity claims against the United States in circumstances similar to those of this case have shared the Ninth Circuit's conclusion. See *General Electric Co.* v. *United States*, 813 F.2d 1273, 1275-1276 (4th Cir. 1987), vacated on other grounds, 484 U.S. 1022 (1988); *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023, 1027-1028 (1st Cir. 1985), cert. denied, 476 U.S. 1126 (1986).[5]

[4] See also *Bilderback* v. *United States*, 558 F. Supp. 903, 908 (D. Or. 1982), cited at Pet. 24 n.2 ("[F]ederal law may provide the rule of decision in an FTCA suit when the state court in the state where the act or omission occurred would apply federal law in a like action between private parties.").

[5] Courts of appeals have held in various other situations that the United States is entitled, under the FTCA, to protections that would be available to analogous private parties under state law, even where the state law does not literally apply to the federal government. See *Stewart* v. *United States*, 716 F.2d 755 (10th Cir. 1982) (United States entitled to immunity under state workers' compensation statute as a "statutory employer," although not technically covered), cert. denied, 469 U.S. 1018 (1984); *Roelofs* v.

2. Petitioners also contend (Pet. 25-30) that the decision below conflicts with this Court's decision in *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983). *Lockheed*, however, held only that FECA does not itself bar third-party claims for indemnity. Nothing in the statute or in *Lockheed* suggests that FECA affirmatively authorizes such claims. See Pet. App. A41; *General Electric*, 813 F.2d at 1276 n.2; *Maine Asbestos Litigation*, 772 F.2d at 1028. Indeed, FECA is irrelevant to the question of whether other law provides a ground for recovery. In *Lockheed* itself, after deciding that FECA did not bar the plaintiff's claim, this Court made clear that it was not deciding the separate question of whether the plaintiffs had a valid claim for indemnity from the United States under the governing substantive law. 460 U.S. at 197 n.8, 199.

In this case, as in *Lockheed*, the only law that waives the United States' sovereign immunity is the FTCA. Liability under the FTCA turns, as discussed above, on the

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United States, 501 F.2d 87 (5th Cir. 1974) (same); *Starns* v. *United States*, 923 F.2d 34 (4th Cir.) (state cap on damages in a medical malpractice suit, applicable by its terms only to state-licensed facilities), cert. denied, 112 S. Ct. 54 (1991); *Taylor* v. *United States*, 821 F.2d 1428 (9th Cir. 1987) (same), cert. denied, 485 U.S. 992 (1988); *Lucas* v. *United States*, 807 F.2d 414 (5th Cir. 1986) (same); *Proud* v. *United States*, 723 F.2d 705 (9th Cir.) (state statute limiting liability of private landowners who open land for public recreational use applies to users of national parks, regardless of whether statute was intended to apply to government-owned land), cert. denied, 467 U.S. 1252 (1984); *Mandel* v. *United States*, 719 F.2d 963 (8th Cir. 1983) (same); *Reilly* v. *United States*, 863 F.2d 149 (1st Cir. 1988) (state "collateral source" statute applicable to state-licensed health care providers also limits United States' liability under FTCA); *Scheib* v. *Florida Sanitarium & Benevolent Ass'n*, 759 F.2d 859 (11th Cir. 1985) (same).

potential liability under the governing substantive law, here the law of Alaska, of a hypothetical private party situated similarly to the United States. Such a party's amenability to suit would be determined, not under FECA, but under the terms of Alaska's workers' compensation statute. Petitioners have failed to make out a case that could be successfully prosecuted against a similarly situated private employer under Alaska law, and the court of appeals therefore correctly affirmed the judgment against them.

3. Petitioners' reliance (Pet. 23-24) on *Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957), and *United States* v. *Muniz*, 374 U.S. 150 (1963), is similarly misplaced. Those cases held only that the United States, under the FTCA, may not enjoy certain immunities that state law would grant to a public party, such as a municipality or a state official. This case turns instead on the availability of an immunity that the state grants to similarly situated private parties. See, *e.g.*, *Rayonier*, 352 U.S. at 319 ("the test * * * for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred"). Because Alaska would not impose liability on a private party under the circumstances of this case, the United States cannot be held liable under the FTCA.

The Court in *Muniz* did suggest that there was a proper analogy, for FTCA purposes, between suits by federal prisoners against the United States and suits by state prisoners against state officials or the States themselves, 374 U.S. at 159-160, and nonetheless rejected the application to FTCA actions of immunity principles that might have barred similar suits in some States. *Id.* at 164-165. *Muniz* could thus be read broadly (although

in some tension with *Rayonier*) for the proposition that special federal rules may be appropriate where the only available state law analogy would be to an action against the State or one of its officials. Even so read, however, we think the decision would be best viewed as turning on its unique facts, and of limited relevance to an ordinary FTCA case, such as this, where the analogy to a state law suit against a private party is unproblematic.

4. Finally, petitioners cite *Megge* v. *United States*, 344 F.2d 31 (6th Cir.), cert. denied, 382 U.S. 831 (1965), in which the Sixth Circuit held that the United States was not subject to suit under the FTCA for serving alcohol to an intoxicated serviceman on a military base in Michigan, even though a private, state-licensed tavern would have been subject to suit under Michigan's "dramshop" law. Although *Megge* held that the United States was immune from suit, its reasoning is largely inconsistent with the reasoning relied on in the decision below and in *General Electric*, *Maine Asbestos Litigation*, and the cases cited in note 5, *supra*. More than 25 years have passed since *Megge* was decided, however, and the opinion has never been cited, by the Sixth Circuit itself or by any other federal court of appeals.[6] Moreover, we think it unlikely that the Sixth Circuit would now rely on the reasoning of *Megge*, which was used to restrict the government's waiver of sovereign immunity, to *expand* the liability of the United States beyond that of a private actor under state law. There is accordingly no conflict that warrants review by this Court.

[6] The only district court to cite its result on this question distinguished the case on its facts. See *Deeds* v. *United States*, 306 F. Supp. 348, 355 n.14 (D. Mont. 1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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